PP v. ALIAS MD YUSOF

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
STEPHEN CHUNG JCA
MOHAMAD ZABIDIN MOHD DIAH JCA
[CRIMINAL APPEAL NO: P-06B-18-04-2018]
14 FEBRUARY 2019

CRIMINAL LAW: *Malaysian Anti-Corruption Commission Act 2009 – Section 16(a)(B) – Sting operation by Malaysian Anti-Corruption Commission – Accused acquitted and discharged – Appeal by prosecution – Whether similar fact evidence from another charge against accused admissible current charge – Whether appellate court could dismiss appeal if misdirection did not result in miscarriage of justice – Whether courts below correct in acquitting and discharging accused*

Based on an information received that certain officers and staff of Bahagian Kawalan Penapisan Filem dan Penguatkuasaan Cawangan Pulau Pinang, Kementerian Dalam Negeri ('FINAS') were protecting a syndicate of illegal VCD and DVD business operators in exchange for receiving protection money, the Malaysian Anti-Corruption Commission ('MACC') set up a sting operation called 'Ops Power'. The MACC rented a VCD shop owned by SP14 and assigned an *agent provocateur*, SP6, to operate the shop undercover and to report if any FINAS officers demanded protection money. On 23 September 2013, SP14 informed SP6 that the respondent, a public servant, had contacted him and demanded RM1,500 to be paid in forbearance from taking legal action against the premises operated by SP6 and that the respondent would contact SP6. Subsequently, SP6 received a call from the respondent who introduced himself as 'Alias from Censor Board' and SP6 was told that it was actually SP14 who had requested him to call SP6 and the respondent asked SP6 to meet him at Restoran Pelita. The following day, SP6 met the respondent at the restaurant in accordance with their arrangement. SP6 stated that the respondent asked him to pay the cash of RM1,500 inside his car. However, SP6 stated that he counted the money at the table before handing it to the respondent in the restaurant. The respondent was subsequently charged for two offences under s. 16(a)(B) of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act') and punishable under s. 24 of the same Act. At the end of the trial, the Sessions Court Judge ('SCJ') acquitted and discharged the respondent under both charges. The appellant appealed against the order of acquittal and discharge to the High Court. After hearing submissions, the High Court dismissed the appeal and affirmed the order of acquittal and discharge of the SCJ. The appellant filed an appeal against the order of the High Court in respect of the first charge but did not file any appeal in respect of the acquittal and

A discharge under the second charge. The appeal herein was only in respect of the acquittal and discharge under the first charge. The crux of this appeal, based on the evidence of SP6, who was the key witness for the prosecution, was whether the appellant had established his case against the respondent under the first charge.

B **Held (dismissing appeal; affirming order of High Court)**
Per Stephen Chung JCA delivering the judgment of the court:

(1) SP6 was an officer of the MACC and was instructed to act as an undercover agent or agent provocateur in the sting operation. His evidence as an *agent provocateur* was different from an accomplice and as such, did not require corroboration. Whether SP6 was a credible witness or otherwise, was a finding of fact to be determined by the trial judge. There was no evidence of entrapment in this case. Further, the appellant did not submit on similar fact evidence or that the evidence of receipt of corrupt money in respect of the second charge was relevant and admissible to establish that the receipt of the RM1,500 under the first charge was intentional or accidental, or to rebut a defence which would otherwise be open to the accused. (paras 23 & 24)

(2) The MACC report of SP14 stated that the respondent was collecting the money on behalf of SP11, his superior. There was no earlier report that the respondent had previously or regularly solicited and received corrupt money from SP14. It was misconceived for the appellant to argue that based on similar fact evidence, relying on the transcripts in exh. P17 and exh. P18 of the phone conversations between SP6 and the respondent, that the respondent had corruptly received the RM1,500 at Restoran Pelita. (para 28)

(3) The alleged incident under the second charge occurred about a month after the incident at Restoran Pelita and had no bearing on what transpired at Restoran Pelita to show a propensity on the part of the respondent that he was corrupt. The respondent was also acquitted and discharged under the second charge. The appellant did not file any appeal against that acquittal and discharge, which meant that the appellant had failed to prove its case against the respondent. Therefore, the appellant could not rely on the evidence adduced in respect of the second charge as similar fact evidence that the respondent had corruptly received the RM1,500 at Restoran Pelita. (paras 27 & 29)

(4) A judge sitting alone must subject the prosecution evidence to maximum evaluation and ask himself that if he decides to call the accused to enter his defence and the accused elects to remain silent, whether the judge was prepared to convict him on the totality of the evidence contained in the prosecution case. If the answer is in the negative, then no *prima facie* case has been made out. This exercise could not be postponed to the end of the trial. The SCJ failed to make a finding on the credibility

or otherwise of SP6 and SP1 before ruling that a *prima facie* case had been made out which amounted to a misdirection. However, this misdirection did not result in any miscarriage of justice based on the totality of the evidence at the end of the trial. An appellate court retains a discretion to dismiss an appeal although there is a misdirection, if it is of the opinion that no substantial miscarriage of justice had occurred. The discretion is codified in the Courts of Judicature Act 1964, specifically s. 92(1) and the proviso s. 60(1). (paras 31 & 32)

(5) It was not recorded in the recording in court nor stated in the transcripts that the respondent had solicited RM1,500 or that the respondent asked for the RM1,500 to be paid inside the car. These contradicted the testimony of SP6 that the respondent asked for RM1,500 and for it to be paid inside the car. The recording also did not show and did not corroborate the testimony of SP6 that he counted the money at the table before handing it to the respondent and thus, contradicted his testimony. The court agreed with the finding of the SCJ that it was not clear whether SP6 passed 30 pieces of RM50 or a blue envelope to the respondent at the restaurant and that this had created a doubt in the prosecution's case against the respondent. (para 36)

(6) The RM1,500 was not given by SP14. Instead, it was from MACC to SP6 to be passed to the respondent at the restaurant. The money was not marked and no photograph was produced of this money to be used as trap money. The money was never seized nor recovered from the respondent or from SP11, although SP6 testified that he handed the RM1,500 to the respondent who said that he was asked to pass the envelope to SP11. Since it was a sting operation, the respondent should have been arrested and the money recovered at the restaurant on that night, but this was not done. There was no explanation given by the prosecution on what had happened to the RM1,500. There were doubts about what transpired at the restaurant on that night or that the respondent had received the RM1,500 from SP6. Hence, it was not safe to convict the respondent under the first charge and the SCJ and the High Court were correct to acquit and discharge the respondent under the first charge. (paras 38 & 39)

Bahasa Malaysia *Headnotes*

Berdasarkan maklumat yang diterima bahawa pegawai-pegawai dan kakitangan tertentu dari Bahagian Kawalan Penapisan Filem dan Penguatkuasaan Cawangan Pulau Pinang, Kementerian Dalam Negeri ('FINAS') melindungi sindiket perniagaan VCD dan DVD haram dengan menerima wang perlindungan, Suruhanjaya Pencegahan Rasuah Malaysia ('SPRM') mengatur operasi perangkap yang dinamakan 'Ops Power'. SPRM menyewa kedai VCD milik SP14 dan menugaskan seorang ejen perangkap, SP6, sebagai penyamar untuk menjalankan perniagaan kedai itu dan melaporkan jika mana-mana pegawai FINAS menuntut wang perlindungan.

Pada 23 September 2014, SP14 memaklumkan SP6 bahawa responden, seorang pegawai awam, telah menghubunginya dan menuntut RM1,500 dibayar untuk tidak mengambil tindakan undang-undang terhadap premis-premis SP6 dan bahawa responden akan menghubungi SP6. Kemudian, SP6 menerima panggilan daripada responden yang memperkenalkan dirinya sebagai 'Alias dari Lembaga Penapisan' dan SP6 dimaklumkan bahawa SP14 yang sebenarnya meminta responden menghubungi SP6 dan responden meminta SP6 berjumpa dengannya di Restoran Pelita. Sehari kemudian, SP6 berjumpa dengan responden di restoran itu menurut apa yang mereka aturkan. SP6 menyatakan bahawa responden meminta dia membayar wang tunai RM1,500 dalam keretanya. Walau bagaimanapun, SP6 menyatakan bahawa dia mengira wang di meja itu sebelum memberikan wang itu kepada responden di restoran. Responden kemudiannya dituduh atas dua kesalahan bawah s. 16(a)(B) Akta Suruhanjaya Pencegahan Rasuah Malaysia ('Akta SPRM') dan boleh dihukum bawah s. 24 Akta yang sama. Di akhir perbicaraan, Hakim Mahkamah Sesyen ('HMS') melepaskan dan membebaskan responden daripada kedua-dua pertuduhan. Perayu merayu terhadap perintah pelepasan dan pembebasan ke Mahkamah Tinggi. Selepas mendengar hujahan, Mahkamah Tinggi menolak rayuan dan mengesahkan perintah pelepasan dan pembebasan HMS. Perayu memfailkan rayuan terhadap perintah Mahkamah Tinggi berkaitan dengan pertuduhan pertama tetapi tidak memfailkan apa-apa rayuan berkaitan pelepasan dan pembebasan bawah pertuduhan kedua. Rayuan ini hanya berkait dengan pelepasan dan pembebasan bawah pertuduhan pertama. Asas rayuan ini, berdasarkan keterangan SP6, saksi utama pihak pendakwaan, adalah sama ada perayu telah membuktikan kesnya terhadap responden bawah pertuduhan pertama.

Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi) Oleh Stephen Chung HMR menyampaikan penghakiman mahkamah:

(1) SP6 ialah pegawai SPRM dan diarahkan bertindak sebagai ejen penyamar atau ejen provokatur dalam operasi perangkap itu. Keterangannya sebagai ejen provokatur berbeza dengan rakan subahat dan, oleh itu, tidak memerlukan keterangan sokongan. Sama ada SP6 saksi yang boleh dipercayai atau sebaliknya, adalah dapatan fakta yang perlu diputuskan oleh hakim bicara. Tiada keterangan pemerangkapan dalam kes ini. Selanjutnya, perayu tidak menghujahkan atas keterangan fakta serupa atau bahawa keterangan penerimaan wang rasuah berkaitan pertuduhan kedua relevan dan boleh diterima untuk membuktikan bahawa penerimaan RM1,500 bawah pertuduhan pertama adalah dengan niat atau tidak sengaja, atau untuk mematahkan pembelaan yang sebaliknya terbuka pada tertuduh.

(2) Laporan SPRM oleh SP14 menyatakan responden mengutip wang itu bagi pihak SP11, pegawai atasannya. Tiada laporan lebih awal bahawa responden, sebelum itu atau sering, meminta dan menerima wang rasuah

daripada SP14. Perayu tersalah tanggap apabila menghujahkan bahawa berdasarkan keterangan fakta serupa, bersandarkan pada transkrip dalam eks. P17 dan P18 tentang perbualan telefon antara SP6 dan responden, responden menerima wang rasuah RM1,500 di Restoran Pelita.

(3) Insiden yang dinyatakan bawah pertuduhan kedua berlaku sebulan selepas insiden di Restoran Pelita dan tiada kaitan dengan apa-apa yang berlaku di Restoran Pelita untuk menunjukkan kecenderungan perayu sebagai seorang yang korup. Responden juga telah dilepaskan dan dibebaskan bawah pertuduhan kedua. Perayu tidak memfailkan apa-apa rayuan terhadap pelepasan dan pembebasan itu yang bermaksud perayu gagal membuktikan kesnya terhadap responden. Oleh itu, perayu tidak boleh bersandar pada keterangan yang dikemukakan berkaitan dengan pertuduhan kedua sebagai keterangan fakta serupa bahawa responden menerima secara rasuah RM1,500 di Restoran Pelita.

(4) Seorang hakim yang bersidang sendirian mesti membuat penilaian maksimum terhadap keterangan pendakwaan dan menanyakan diri beliau bahawa jika beliau memutuskan untuk memanggil tertuduh membela diri, dan tertuduh memilih untuk berdiam diri, sama ada hakim bersedia untuk mensabitkannya atas keseluruhan keterangan dalam kes pendakwaan. Jika dijawab secara negatif, kes *prima facie* tidak dibuktikan. Pelaksanaan ini tidak boleh ditangguhkan sehingga ke akhir perbicaraan. Hakim Mahkamah Sesyen gagal membuat dapatan tentang kebolehpercayaan atau sebaliknya SP6 dan SP1 sebelum memutuskan bahawa kes *prima facie* telah dibuktikan yang bermaksud salah arahan. Walau bagaimanapun, salah arahan ini tidak mengakibatkan salah laksana keadilan berdasarkan keseluruhan keterangan di akhir perbicaraan. Mahkamah rayuan mengekalkan budi bicara untuk menolak rayuan walaupun terdapat salah arahan, jika mahkamah berpendapat bahawa tiada salah laksana keadilan besar berlaku. Budi bicara terakam dalam Akta Mahkamah Kehakiman 1964, khususnya s. 92(1) dan proviso s. 60(1).

(5) Tidak direkodkan dalam rakaman di mahkamah atau dinyatakan dalam transkrip bahawa responden telah meminta RM1,500 atau responden meminta RM1,500 dibayar dalam kereta. Ini bercanggah dengan keterangan SP6 bahawa responden meminta RM1,500 dan meminta wang itu dibayar dalam kereta. Rakaman juga tidak menunjukkan dan tidak menyokong keterangan SP6 bahawa dia mengira wang di meja sebelum menyerahkannya kepada responden dan oleh itu, mencanggah keterangannya. Mahkamah bersetuju dengan dapatan HMS bahawa tidak jelas sama ada SP6 menyerahkan 30 keping wang RM50 atau sekeping sampul biru kepada responden di restoran dan ini membentuk keraguan dalam kes pendakwaan terhadap responden.

(6) Jumlah RM1,500 tidak diberi oleh SP14. Sebaliknya, jumlah itu adalah daripada SPRM kepada SP6 untuk diberi kepada responden di restoran. Wang itu tidak ditandakan dan tiada gambar dikemukakan untuk wang yang digunakan sebagai wang perangkap. Wang itu tidak pernah dirampas atau diperoleh kembali daripada responden atau SP11, walaupun SP6 memberi keterangan bahawa dia menyerahkan RM1,500 kepada responden yang menyatakan bahawa dia diminta menyerahkan sampul itu kepada SP11. Oleh sebab ini adalah operasi perangkap, responden sepatutnya ditangkap dan wang diambil di restoran pada malam itu, tetapi ini tidak dilakukan. Terdapat keraguan tentang apa-apa yang berlaku di restoran pada malam itu atau responden telah menerima RM1,500 daripada SP6. Oleh itu, tidak selamat untuk mensabitkan responden bawah pertuduhan pertama dan HMS dan Mahkamah Tinggi betul apabila melepaskan dan membebaskan responden daripada pertuduhan pertama.

Case(s) referred to:
Agudosi Ikenna Emmanuel v. PP [2015] 1 LNS 1062 CA ***(refd)***
Boardman v. DPP [1974] 3 All ER 887 ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***
Ghasem Hozouri Hassan v. PP [2018] 6 CLJ 133 FC ***(refd)***
Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Makin v. AG for New South Wales [1894] AC 57 ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC ***(dist)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***
Wan Mohd Azman Hassan v. PP [2010] 4 CLJ 529 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 60(1), 92(1)
Criminal Procedure Code, ss. 173, 180
Evidence Act 1950, ss. 14, 15
Malaysian Anti-Corruption Commission Act 2009, ss. 16(a)(B), 24, 50(1), 52(1)

For the appellant - Wong Poi Yoke; DPP
For the respondent - A Chandra Segaran Achannah; M/s Chandra Segaran

[Editor's note: For the High Court judgment, please see PP lwn. Alias Md Yusof [2018] 1 LNS 665 (affirmed).]

Reported by S Barathi

JUDGMENT

Stephen Chung JCA:

The Appeal

[1] The respondent, a public servant, namely a Penolong Pegawai Penguatkuasa with the Kementerian Dalam Negeri, Butterworth, was charged for two offences under s. 16(a)(B) of the Malaysian Anti-Corruption Commission Act 2009 (MACC Act). In the first charge, he was charged for corruptly receiving a sum of RM1,500 from Ng Lap Ken (an *agent provocateur* identified as SP6 at the trial) at Restoran Pelita, Taman Chai Leng, Seberang Prai, Penang on 24 September 2013 at about 8.55pm as an inducement for him to forbear from taking any action against Ng Lap Ken from operating an illegal VCD and DVD business at Taman Chai Leng, Seberang Perai and punishable under s. 24 of the same Act.

[2] In the second charge, he was alleged to have on 23 October 2013 at about 4.23pm corruptly received a sum of RM1,500 from Ng Lap Ken through a CIMB bank account in the name of one Lim Choon Peng as an inducement for him to forbear the same action as in the first charge.

[3] At the end of the trial, the learned Sessions Court Judge (SCJ) acquitted and discharged the respondent under both charges. The appellant appealed against the order of acquittal and discharge to the High Court. After hearing submissions, the High Court dismissed the appeal and affirmed the order of acquittal and discharge of the SCJ.

[4] The appellant filed an appeal against the order of the High Court in respect of the first charge but did not file any appeal in respect of the acquittal and discharge under the second charge. Hence this appeal before us was in respect of the acquittal and discharge under the first charge only.

The Factual Background

[5] The MACC set up a sting operation on information received that certain officers and staff of Bahagian Kawalan Penapisan Filem dan Penguatkuasaan Cawangan Pulau Pinang, Kementerian Dalam Negeri (FINAS) were protecting a syndicate of illegal VCD and DVD business operators in Penang in exchange for receiving protection money. SP2 and SP3 were in charge of the operation called "Ops Power". The MACC rented and took over an illegal VCD shop owned by SP14 who had made a complaint to MACC of FINAS officers demanding protection money.

[6] SP6 was assigned to operate the VCD shop undercover to report if any FINAS officers demanded protection money. On 23 September 2013, SP6 received a phone call from SP14 that a suspect named Alias (the respondent) had contacted him and demanded RM1,500 to be paid in forbearance from taking legal action against the premises operated by SP6. SP14 told SP6 that the respondent would contact SP6 by phone to arrange

A the time and place to meet to hand over the money. About an hour later, SP6 received a missed call from the respondent and SP6 informed SP3 who instructed SP6 to return the phone call. At about 10.15pm SP6 returned the missed call and the receiver introduced himself as 'Alias from Censor Board.' In that phone conversation, the respondent told SP6 that it was actually SP14
B who had requested him to call SP6 and the respondent asked SP6 to meet him at Pelita Restaurant.

[7] The next day, on 24 September 2013, SP6 received a couple of missed calls from the respondent. At 5pm he returned the call and they arranged to meet that night. At 8.45pm SP6 called the respondent after
C receiving another missed call from the respondent who was waiting for SP6 at Pelita Restaurant. After obtaining approval from SP3, SP6 arrived at the restaurant at about 9pm and he noted the presence of other MACC officers in the restaurant and that the respondent was seated at a table. They introduced each other and SP6 said the respondent asked him to pay the cash
D of RM1,500 inside his car who then stood up to wash his hands. When the respondent returned to the table SP6 passed the money to the respondent who reached out to accept the cash and put it in his trouser pocket.

[8] SP6 was fitted with a recording devise with a pinhole video camera and the transaction was recorded.

E

In The Courts Below

[9] At the end of the prosecution's case, the SCJ ruled that from the evidence adduced, the prosecution had established a *prima facie* case that the respondent received money from SP6 at the Pelita Restaurant on the date and
F time as stated in the first charge. The SCJ said that from a viewing of the video recording in exh. P13B at 21:13:08 hours, it could be seen that SP6 passed money to the respondent who took it from SP6 and that the prosecution had proven that the respondent had received the gratification of RM1,500 from SP6, relying on the presumption under s. 50(1) of the MACC
G Act. The SCJ then called upon the respondent to enter his defence.

[10] The respondent elected to give evidence on oath. The respondent denied receiving the cash of RM1,500 from SP6. He said he was directed by his superior officer (SP11) to meet SP14 for work-related issues. He said it was SP11 who had provided the phone number of SP14 for him to call and
H he did not know why SP11 asked him to meet SP14 and he did not ask SP11 for any reason. He said it was SP14 who asked him to call and to meet SP6.

[11] The respondent testified that he was given a blue folded envelope by SP6 who asked him to pass the envelope to his boss. He said he did not know what was inside the envelope and did not open it and all he did was to pass
I the blue folded envelope to his boss the next morning. He said that the blue folded envelope could not have contained cash of RM1,500 as alleged because if it did, it would be quite bulky. The respondent said that the blue

envelope was slim and he was certain that it did not contain any cash and if he knew that it contained cash, he would have refused to accept the envelope from SP6. The respondent called two witnesses, one of whom was SD3, an employee of FINAS. SD3 testified that he had previously on different occasions driven SP11 to meet SP14.

[12] At the end of the defence, and at the end of the trial, the SCJ ruled that it was not a defence of mere denial or afterthought as the defence had been put to SP6 that what was passed to him was a folded blue envelope and not cash of RM1,500. The SCJ ruled that it was not put to the respondent that the item passed from SP6 was cash and not a folded blue envelope. The SCJ further ruled that notwithstanding that SP6 had testified that he had counted the money before handing it over to the respondent, there was no evidence of this from the video recording in exh. P13 B. The SCJ ruled that the defence of the respondent had rebutted the presumption and also raised a reasonable doubt in the prosecution's case. The SCJ then acquitted and discharged the respondent.

[13] On appeal, the High Court affirmed the order of the SCJ to acquit and discharge the respondent. Hence the Public Prosecutor's appeal against that decision of the High Court before us.

The Appeal

The Appellant's Submission

[14] In his petition, the appellant contended that the learned Judicial Commissioner (JC) had erred in discharging and acquitting the respondent under the first charge although the appellant had successfully proven their case beyond reasonable doubt against the respondent at the end of the defence case.

[15] The appellant submitted that the learned JC had erred in finding that the respondent had successfully raised a reasonable doubt. It was submitted that the respondent's defence was a mere denial and afterthought which did not rebut the presumption under s. 50(1) of the MACC Act because the respondent's defence was of only receiving a blue envelope and he was directed to give it to SP11 was denied by SP6 and was never put to SP11.

[16] It was submitted that although the appellant did not pursue any appeal against the acquittal under the second charge, the learned JC had erred in finding that the evidence relating to the second charge could not be used for the first charge. It was submitted that the learned JC had erred in distinguishing the facts of *Thavanathan Balasubramaniam v. PP* [1997] 3 CLJ 150 in dismissing the use of the evidence for the second charge to support the conviction of the first charge which was clearly contrary to the principle in the said case.

A **[17]** The appellant submitted that the learned JC had erred in finding that the SCJ was correct to re-evaluate the evidence of SP6 and SP11 at the defence stage. It was submitted that the learned JC had erred in finding that the evidence of SP6 was doubtful and exaggerated. It was argued that any discrepancies or conflicting evidence given by SP6 and the transcripts were
B not material contradictions and that SP6's evidence was amply supported by exhs. P10, P13 B, P16, P17, P18 and P25. It was submitted that under s. 52(1) of the MACC Act, SP6's evidence as an *agent provocateur* did not require corroboration and should not be regarded as an unreliable witness.

The Respondent's Submission

C **[18]** Counsel for the respondent submitted that SP6 being a trap witness who took the video through a hidden camera was not a credible witness. Firstly, he said he counted the money before handing it over to the accused but there was no evidence from the video recording. Secondly, SP6 alleged that the accused asked him to pass the money in the car but this too was not
D reflected in the video nor transcripts. Thirdly, SP6 said the accused put the money into his pocket but this was not shown in the video. Instead, it showed the accused putting what was received into his bag. It was submitted that the SCJ had dealt with these discrepancies and after re-evaluation, the SCJ found doubts in the testimony of SP6.

E **[19]** It was submitted that the prosecution was also unsure of its case because in his submission in reply at the end of the prosecution's case, the learned DPP submitted under "Kemungkinan mengambil rasuah di tempat itu terang" berhujah bahawa "Wang itu bertukar tangan dengan amat pantas tiada siapa yang akan perasan kerana jika dilihat perbandingan masa".

F **[20]** The respondent submitted that although SP6 said that he handed the cash of RM1,500 to the accused, the accused denied receiving any cash but a blue envelope on that night in the restaurant. It was submitted that if SP6 had passed the money to the accused as he alleged, the MACC officers who
G were present would have seiszed the cash from the accused but the cash was never seized from the accused. It was submitted that this raised a doubt in the testimony of SP6 and the prosecution's case.

[21] Counsel referred to the discrepancy in the testimony of SP11 who denied that he knew SP14 or that he had asked and received protection
H money from SP14, whereas SP14 testified that he knew and paid protection money to SP11. It was submitted that there was no explanation for this discrepancy which created another doubt in the prosecution's case. It was submitted that the appellant had failed to prove its case against the respondent.

I

Our Decision

[22] To reiterate, the appellant submitted that the learned JC had erred in finding that the respondent had successfully raised the innocent explanation when in fact the respondent's defence was a bare denial and afterthought which did not rebut the presumption under s. 50(1) of the MACC Act. It was argued that the defence of only receiving a blue envelope and that he was directed to give it to SP11 was denied by SP6 and which was never put to SP11 and that SP6 was a credible witness. It was also submitted that the defence had been rebutted through similar fact evidence that the respondent had corruptly received another payment of RM1,500 which was supported by the transcripts of phone conversations between SP6 and the respondent on 23 October 2013 in respect of the second charge and which evidence was adduced at the joint trial. It was submitted that the learned JC had erred in distinguishing the case of *Thavanathan Balasubramaniam v. PP (supra)* and erred in finding that the SCJ was correct that the evidence of SP6 was doubtful and exaggerated after re-evaluating the evidence of SP6 and SP11 at the defence stage.

[23] First, it was not in dispute that SP6 was an officer of the MACC and was instructed to act as an undercover agent or *agent provocateur* in the sting operation. His role was to uncover the offence and gather evidence to be given at the trial against the accused. His evidence as an *agent provocateur* was different from that of an accomplice and as such required no corroboration. Notwithstanding that, whether SP6 was a credible witness or otherwise is a finding of fact to be determined by the trial judge. In this case, there was no evidence of entrapment: see *Wan Mohd Azman Hassan v. PP* [2010] 4 CLJ 529; [2010] 4 MLJ 141. The crux of this appeal, based on the evidence of SP6, who was the key witness for the prosecution, was whether the appellant had established his case against the respondent under the first charge.

[24] Secondly, after reading the submissions of the appellant in the lower courts, the appellant did not submit on similar fact evidence or that the evidence of receipt of corrupt money in respect of the second charge was relevant and admissible to establish that the receipt of the RM1,500 under the first charge was intentional or accidental, or to rebut a defence which would otherwise be open to the accused. This was raised for the first time before us.

[25] The appellant's reference to the case of *Thavanathan Balasubramaniam v. PP* (*supra*) in the courts below was in respect of the presumption under s. 50(1) of the MACC Act and whether the respondent's explanation was innocent or otherwise. In that case, the question was whether the evidence in the earlier trial could be admitted in subsequent trial where such evidence are relevant to facts in issue. On the facts, we agreed that the learned JC was correct to distinguish that case.

[26] We refer to ss. 14 and 15 of the Evidence Act 1950 on similar fact evidence. *Makin v. AG for New South Wales* [1894] AC 57 laid down the principle on the admissibility of similar fact evidence, which consists of two limbs: see *Junaidi Abdullah v. PP* [1993] 4 CLJ 201; [1993] 3 MLJ 217. The judge has to decide whether the evidence which it is proposed to adduce is sufficiently substantial having regard to the purpose to which it is professedly directed to make it desirable in the interest of justice and fairness: *Boardman v. DPP* [1974] 3 All ER 887. This was never submitted before us.

[27] It was not in dispute that at the material time, the respondent was an enforcement officer with FINAS (see exh. P2) and SP6 did not know and had not met the respondent prior to their meeting at Restoran Pelita. As part of the sting operation, it was arranged for SP6 to operate the illegal VCD and DVD stall, which was owned by SP14, together with an employee of SP14 known as Lim. This Lim was not the Lim Choon Peng (SP7) stated in the second charge where it was alleged that on 23 October 2013 that the respondent had asked SP6 for RM1,500 to be deposited into a bank account of Lim Choon Peng. This alleged incident on 23 October 2013 under the second charge occurred about a month after the incident at Restoran Pelita on 24 September 2013 and had no bearing on what transpired at Restoran Pelita earlier to show a propensity on the part of the respondent on 24 September 2013 that he was corrupt.

[28] According to the MACC report of SP14 made on 23 September 2013 at 2200 hrs (exh. P25), SP14 stated that on 23 September 2013 at about 12 noon he received a call from a Malay man who introduced himself as Alias (respondent) from the Censor Board who was sent by his superior Tengku Jamaludin (SP11) to collect the monthly fee replacing Man J (also referred to as JJ in the notes of proceedings). That meant he was collecting on behalf of SP11. That was the only report lodged by SP14. There was no earlier report that the respondent had previously or regularly solicited and received corrupt money from SP14. Exhibit P25 tend to contradict the contention of the appellant on similar fact evidence. Therefore, it was misconceived for the appellant to argue that based on similar fact evidence, relying on the transcripts in exh. P17 and exh. P18 of the phone conversations between SP6 and the respondent on 23 October 2013, that the respondent had corruptly received the RM1,500 at Restoran Pelita.

[29] We also took note of the fact that the respondent was acquitted and discharged under the second charge and the appellant did not file any appeal against that acquittal and discharge. That meant that the appellant had failed to prove its case against the respondent that he had corruptly received the RM1,500 from SP6 through the bank account of Lim Choon Peng. Therefore, the appellant could not rely on the evidence adduced in respect of the second charge as similar fact evidence that the respondent had

corruptly received the RM1,500 at Restoran Pelita. In a criminal case, whether the respondent had corruptly solicited and received the RM1,500 at Restoran Pelita must be proved by the appellant as a matter of fact and law beyond reasonable doubt. That burden does not shift onto the respondent.

[30] Based on the appeal record, the SCJ had called on the respondent to enter defence after making a finding of *prima facie* case. At the end of the defence, and at the end of the trial, after re-evaluating the evidence of SP6 and SP11, both the SCJ and the learned JC were of the view that the evidence of SP6 was doubtful and exaggerated. The courts below found that on a balance of probabilities that the explanation of the respondent had rebutted the presumption under s. 50(1) of the MACC Act that he had corruptly received the RM1,500 at Restoran Pelita on that night. They also found that the defence had raised a doubt on the prosecution's case. The appellant submitted that the learned JC had erred in finding that the SCJ was correct in law to re-evaluate the evidence of SP6 and SP11 and then made a finding that the evidence of SP6 was doubtful at the defence stage.

[31] We revisit the test to be applied in determining whether a *prima facie* case had been made out under s. 173 or s. 180 of the Criminal Procedure Code. It has been settled that a judge sitting alone must subject the prosecution evidence to maximum evaluation and ask himself whether if he decides to call the accused to enter his defence and the accused elects to remain silent, is the judge prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative, then no *prima facie* case has been made out. It does not mean that the prosecution has to prove its case beyond a reasonable doubt at this intermediate stage: see *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101; [1983] 2 MLJ 232 followed in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734; [2003] 2 MLJ 65. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close for the prosecution before the court can rule that a *prima facie* case has been made out in order to call for the defence: *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457; [2002] 3 MLJ 193 FC.

[32] On the above authorities, on the record of appeal, the SCJ failed to make a finding on the credibility or otherwise of SP6 and SP11 before ruling that a *prima facie* case has been made out which amounted to a misdirection. However, we were of the view that this misdirection did not result in any miscarriage of justice based on the totality of the evidence at the end of the trial. An appellate court retains a discretion to dismiss an appeal even there is a misdirection if it is of the opinion that no substantial miscarriage of justice has occurred. This discretion accorded to an appellate court is codified in the Courts of Judicature Act 1964, specifically s. 92(1) and the proviso to s. 60(1): *Ghasem Hozouri Hassan v. PP* [2018] 6 CLJ 133; [2018] MLJU 601 FC; see also *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381; [2001] 1 MLJ 259.

[33] In this case, at the end of the defence and at the end of the trial, the SCJ re-evaluated the totality of the evidence and found that the defence had rebutted the presumption on a balance of probabilities and also found that the defence had raised a reasonable doubt on the prosecution's case. On appeal, the learned JC had made a finding that the SCJ was correct in doing so. Both the SCJ and learned JC had directed themselves and dealt with this in separate exercise: see *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169. It is trite that an appeal being a continuation of the proceedings by way of rehearing, the appeal court is empowered to review all the available evidence as adduced before it: *Agudosi Ikenna Emmanuel v. PP* [2015] 1 LNS 1062; [2016] 2 MLJ 596.

[34] Coming back to the evidence, it was SP14 who told SP6 about the respondent and that the respondent asked SP14 to pay monthly protection money and made arrangement to meet to pass the money. SP14 told the respondent to contact his PR person namely SP6 and he told SP6 that he would give the telephone number of SP6 to the respondent for the respondent to contact SP6.

[35] SP6 testified that on 23 September 2013, SP14 called him that the respondent asked for RM1,500 as an inducement not to take any action against him. After SP14 had telephoned the respondent and SP6, the respondent and SP6 telephoned each other to make arrangements to meet. They met at Restoran Pelita on 24 September 2013 at about 9pm where SP6 passed something to the respondent while both were seated at a table. SP6 testified that the respondent asked him to pass the RM1,500 inside the car but previously his officers instructed him not to pass money inside a car. Therefore, he passed the cash money consisting of 30 pieces of RM50 which amounted to RM1,500 after he counted the money at the table before handing it to the respondent in the restaurant. Whereas the respondent testified that he did not asked for money and that he received a thin folded blue envelope from SP6 to be passed to SP11. He said he did not know the contents of the envelope and it could not have contained the 30 pieces of RM50 amounting to RM1,500 as alleged otherwise it would be thick or bulky.

[36] During the appeal, the learned DPP requested for the audio and visual recording at Restoran Pelita to be played and it was played and shown in court. We took note that the recording, especially the audio, was not very clear and this was reflected in the transcripts with the words "(tak jelas)" throughout the transcripts. Listening and watching the recording in court and reading the transcripts, it was not recorded nor stated that the respondent had solicited RM1,500 or that the respondent asked for the RM1,500 to be paid inside the car. These contradicted the testimony of SP6 that the respondent asked for RM1,500 and for it to be paid inside the car (see p. 20 Jilid 3 appeal record). Similarly the recording did not show and did not corroborate the testimony of SP6 that he counted the money at the table before handing it to the respondent. Again this contradicted his testimony as such.

[37] In the same testimony, SP6 said he passed the 30 pieces of RM50 in his right hand to the respondent who received the money with his right hand and put it into his right trouser pocket without counting the money. In cross-examination, SP6 was challenged on this and he then said he was not sure whether it was put inside the pocket or a bag. It was also put to SP6 that he passed a folded thin blue envelope to the respondent to be passed to SP11 to which SP6 denied. Watching the recording, at normal speed and in slow motion several times, we agreed with the finding of the SCJ that it was not clear whether SP6 passed 30 pieces of RM50 or a blue envelope to the respondent at the restaurant and that this had created a doubt in the prosecution's case against the respondent.

[38] We bore in mind that this was a sting operation conducted by the MACC against FINAS officers. The RM1,500 was not given by SP14. Instead it was from MACC *via* SP3 to SP6 to be passed to the respondent at the restaurant. The money was not marked and no photograph was produced of this money to be used as trap money. When the respondent left the restaurant, he was not arrested there and then although there were MACC officers in the restaurant as part of the sting operation. None of them were called to testify that they saw SP6 handing over the RM1,500 to the respondent and that it was not a blue envelope. In the circumstances, one of them could have secretly recorded the transaction on video or mobile phone to corroborate what SP6 had said, but this was not done. The money was never seized nor recovered from the respondent or from SP11 although SP6 testified that he handed the RM1,500 to the respondent who said he was asked to pass the envelope to SP11. Although SP11 was called to testify, he was not asked by the prosecution to say that he never received the money from the respondent as the respondent had alleged. Since it was a sting operation, the respondent should have been arrested and the money recovered at the restaurant on that night but this was not done. There was no explanation given by the prosecution on what happened to the RM1,500.

[39] On the evidence, we agreed with the findings of the SCJ and the learned JC that there were a lot of doubts raised about what transpired at the restaurant on that night or that the respondent had received the RM1,500 from SP6: see *Mat v. PP* [1963] 1 LNS 82; [1963] 1 MLJ 263. These were findings of facts. On evidence, in the record of appeal, there was no reason for us to interfere with the findings of facts of the lower courts. We were unanimous that it was not safe to convict the respondent under the first charge. The SCJ and the learned JC were correct to acquit and discharge the respondent under the first charge. Therefore, the appeal was dismissed and we affirmed the order of the High Court given on 23 March 2018.